Case No. 82-6203

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term

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ALEX WAKEMAN and WALTER TEN FINGERS, Appellants,

v.

STATE OF SOUTH DAKOTA, Appellee.

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On Appeal from the

Supreme Court of South Dakota

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MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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First Amendment Issue

This memorandum is submitted in opposition to Appellee's Motion to Dismiss or Affirm the appeal herein. As to the first issue of the appeal, that the South Dakota open fire statutes are repugnant to the First Amendment protection of Appellants' religious activities, the Appellee has argued that the appeal on this issue is without merit because the facts of the case allegedly show that enforcement of the statutes is the least restrictive means of achieving the compelling state interest of protecting the public from forest fires. Although Appellants strongly believe that the record does not support Appellee's assertions, these concerns are premature because the South Dakota Supreme Court never reached this question. Rather, the lower court ruled that the Appellants had not met their initial burden of showing that the statutes as enforced had a coercive effect on the exercise of their religion because they had not shown that there existed no other lawful alternative methods to perform their religious ceremonies. If, in the lower court's eyes, the Appellants had met their initial burden of showing coercion, the burden would have shifted to the state to show that the impingement upon their religious liberty was the least restrictive means of achieving the compelling state interest. Because the lower court never reached this question of the state's burden, Appellee's arguments in support of its motion are not relevant to this appeal. The issue, as clearly stated in the Appellants' Joint Jurisdictional Statement and by the South Dakota Supreme Court, is whether or not the Appellants in meeting their initial burden were required to prove that no other lawful alternative methods existed for the performance of their religious ceremonies. Appellee has failed to address this issue.

Even had the lower court reached the issue concerning the State's burden, the statutes, as enforced against Appellants, were clearly not the least restrictive means of achieving the goal of protecting the public from forest fires. It is undisputed that the Appellants, through their representative, did in fact apply for a state open fire permit for their ceremonial fires three days before their arrest. It is undisputed that the religious encampment had been visited on more than two prior occasions by both Forest Service and State law enforcement officials and that these officials knew the exact location of the camp, the exact location of the ceremonial fires, and the persons attending the religious fires. On one of those prior occasions three "volunteers" from the Camp were arrested by Appellee for not having fire permits, the Camp members were told to apply for a permit, and they were left with the belief that one would be granted. It is undisputed that the very same Forest Service official who denied the permit application was conducting an at times unattended "controlled" burn of the forest in the immediate area of the encampment.

Thus, Appellee's assertions that Appellants had in essence not applied properly for the open fire permit are patently ludicrous when viewed in context of the full record because the State and Forest Service officials were certainly aware of the exact location, dates, and attendants of the religious fires. The assertion concerning the unfavorable weather conditions was directly contradicted not only by the "controlled burn" but by the Forest Service official's own testimony at trial that he did not remember what the conditions were at the time and could only "guess" at them. The record discloses that each witness that did remember the conditions at the time, remembered that they were unchanged from the date of the application to the date of the arrests and that there was no unusual fire danger present due to the weather. The Forest Service and State officials

personally inspected the religious fires on several occasions both prior to and during the arrests and it was the undisputed testimony of those officials as well as all prosecution and defense witnesses that the fires were in well-constructed, small pits with the debris cleared from around them and that none had escaped or posed any danger of escaping. It was also the undisputed testimony that the fires were constantly attended and devoutly cared for as religious objects crucial to Appellants' traditional ceremonies. The Appellee by its motion and selective recitation of the facts is attempting to retry this matter. The trial court was the fact-finder here, and it and the South Dakota Supreme Court had no difficulty finding that it was proven that the encampment was a non-violent, peaceful Camp having the purpose of attaining spiritual growth and fulfillment according to traditional Lakota religious practices and ceremonies. Although the very same facts cited by Appellee were before those courts, neither found that Appellants had not properly applied for the permit.

The point Appellants are trying to establish here is that the denial of the permit application by the Forest Service official acting under state law was clearly based upon sham, bureaucratic reasons which grew out of the racist attitude of that official and the State officials in charge toward the Indian encampment. The State official who ordered the arrests admitted in his testimony that it was his purpose to shut down and clear the encampment out of his county. Another State official admitted in his testimony that they had not forgotten certain violent confrontations with members of the American Indian Movement years before and that they therefore took special measures, including the enlisting of large numbers of officers from other jurisdictions, during the arrests of Indian persons at Indian gatherings, even though the Appellants and the encampment had never been tied in any way to the American Indian Movement and had at all times been clearly peaceful, religious, and unarmed. The arrests herein were made by a totally inordinate number of

well-equipped officers. Even before making their application for the permit, Appellants testified that one of the officials had told them "jokingly" that killing a deer or a buffalo was on par with killing an Indian. The Forest Service official who denied the application made no attempt to solicit more information because he did not need it and made no attempt to work out conditions which would have allowed the encampment to continue because he and the other state officials did not want to accommodate the encampment in any manner.

In light of the record, Appellee's argument that Appellants are not protected by the First Amendment because they did not properly dot each "i" in the application is absurd. The argument avoids the real issue which is whether the state statute on its face as applied to Appellants is unconstitutional as repugnant to the First Amendment. At trial, the burden was upon the State to prove that this was the least restrictive means of protecting the public from forest fires. The record discloses that the State not only failed to meet this burden, but failed to understand that it had such a burden. The State completely failed to show that it could not have granted the permit upon certain express conditions which would have protected the forests while allowing the Appellants to perform their ceremonies. It is questionable whether the State open fire statute would even allow conditional permits during unfavorable climatic conditions while, notably, the federal open fire regulations expressly allow them. Compare, SDCL 34-35-17 with 36 C.F.R §261.1a.

The State also completely failed to show that it could not have made an exemption to the statute for the pit fires necessary for the performance of Indian religious ceremonies. See, Frank v. State, Alaska, 604 P.2d 1068, 1070 (1979). This would not have been unreasonable in view of the special religious significance these fires have and the historic care which is taken with them by the participants in the ceremonies. Indeed, the trial testimony of the expert on the Lakota people showed that the

moral constraint upon the participant in Lakota religious ceremonies on the negligent use of fire or the allowance of the fire to escape and burn any of the forest is a far greater protection of the public from forest fires under these circumstances than is the State statute. Appellants were not on a picnic, but were engaged in traditional religious ceremonies which had been practiced by their people in these same forests for hundreds of years, long before the open fire statute or State had even come into existence.

Treaty Issue

On the treaty issue, that Appellants are possessed of at least residual rights to the free exercise of their religion on former treaty lands, Appellee asserts in support of its motion that these rights were abrogated by the Act of 1877 and that even if they did exist they were properly subject to regulation by State statute. Like the previous issue, Appellee failed to address the initial issue created by the opinion of the South Dakota Supreme Court -- that jurisdiction on any and all treaty questions lay only with the United States Court of Claims. It is understandable that Appellee chose not to address this issue because the lower court's opinion is so patently at odds with the current state of law concerning jurisdiction over treaty rights. The Appellants were not claiming monetary damages for loss of treaty rights, but were asserting existing treaty rights in defense of their religious activity on treaty lands. This is a fundamental misunderstanding made by the lower court, however, it still stands as the rationale by the highest court in South Dakota for not entertaining treaty rights issues. For this reason, Appellants urge this Court to reverse the lower court and clear up the confusion before the opinion can work further damage on the rights of Indian citizens.

Under the current rule of law, Indian treaty rights remain in existence unless expressly abrogated by Act of Congress. See,

Menominee Tribe v. United States, 391 U.S. 404, 412-13, 88 S.Ct. 705, 20 L.Ed.2d 697, 703 (1968). The Act of 1877, 19 Stat. 254, specifically provided for the ceding of all "territory" and all "hunting" privileges possessed by reason of the Treaty of 1868, 15 Stat. 635. It made absolutely no mention of any other rights other than the right of ownership and the right to hunt on those lands. By its own language, it did not extinguish any other rights of "usage" by the Sioux (Lakota) of those lands which had been guaranteed by the 1868 Treaty. On the contrary, Article 8 of the Act of 1877 specifically provided that the "provisions of said treaty of 1868, except as herein modified, shall continue in full force, and ...each individual shall be protected in his rights of property, person and life." If we were to adopt Appellee's argument that the Act of 1877 was a complete abrogation of the Treaty and extinguished all rights whatsoever thereunder, the last-mentioned provision would be rendered meaningless and become surplusage, in violation of the well-known rule of statutory construction against such interpretations where they can be avoided. Appellee's argument also ignores a line of decisions by this Court, including Menominee Tribe, which hold that certain treaty rights may survive a general abrogation and taking of treaty lands.

The second argument by Appellee, that any residual treaty rights may be regulated by the State, is too simplistic. The Puyallup decision cited by Appellee, held that the activities pursuant to such treaty rights may be regulated by the State, provided the regulation meets appropriate standards and does not qualify these rights. Puyallup Tribe v. Department of Game, 391 U.S. 392, 398, 20 L.Ed.2d 689, 88 S.Ct. 1725 (1968). "The appropriate standards requirement means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure, and that its application to the Indians is necessary in the interest of conservation." Antoine v. Washington, 420 U.S. 194, 207, 43 L.Ed.2d 129, 139, 95 S.Ct. 944 (1975).

Not only did the enforcement of the statute against the Appellants have the effect of qualifying their treaty right to practice their traditional religious ceremonies on treaty lands, but the State utterly failed at trial to demonstrate that its regulation was a reasonable and necessary measure to protect the forest and that its application to Appellants was neccessary in the interest of such protection of the forest. On the contrary, the record shows through undisputed trial testimony on this issue that the regulation did not need to be applied to Appellants to protect the forest. The fires were sacred to the Lakota persons conducting the ceremonies and an exemption from state regulation is required by treaty law under the Supremacy Clause of the United States Constitution for reasons largely identical to why one is required under the First Amendment under the rationale mentioned in Frank. Only the federal government, not the State, may "qualify" these treaty rights through specific legislation.

It should be noted concerning these First Amendment and treaty arguments, that they are based upon findings: that there is a compelling state interest of the highest order, that this interest cannot be otherwise served, that the enforcement of the statute is the least restrictive means of achieving the interest, that Appellants were a substantial threat to public safety, that the regulation is subject to narrow, objective, and definite standards, and that Appellants cannot be exempted from the application of the regulation. See, Robinson v. Price, 615 F.2d 1097, 1099 (5th Cir. 1980)(summing up the line of United States Supreme Court decisions on this burden); Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51, 22 L.Ed.2d 162, 167, 89 S.Ct. 935 (1969); Frank v. State, supra; Antoine v. Washington, supra. In other words, in order for the State to meet its burden to justify regulation of First Amendment and treaty protected rights there must be some proof by the State and findings by the trial court concerning the nature of the State's interests, the urgency

of the regulation (ie, the threat to the forest by Appellants' ceremonial fires), the existence and appropriateness of the regulatory standards, and the reasons why an exemption could not be granted and allow those rights to be exercised. At trial, not only was such proof skimpy to non-existent, but the trial court (as fact-finder because the court denied Appellants a jury) made no such findings whatsoever because it made the unbelievable ruling that it did not have subject matter jurisdiction to hear arguments based on the First Amendment or on the 1868 Treaty and, therefore, never reached the State's burden of proof. Thus, it is premature to even consider these issues without some findings by the trial court on the question of whether or not the State met its burdens of proof on them at trial.

Preemption by Forest Service Regulation

As to the third issue, preemption of the State open fire statute by federal open fire regulations, Appellee argues that the federal statutes which authorized the federal regulations and the Cooperative Fire Control Agreement, 16 U.S.C. §§561a and 561a-1, waive any existing conflict between the federal open fire regulations and the State statute. Appellee does not contest the fact that the federal and state open fire permit procedures and requirements conflict with each other to the extent that in certain circumstances compliance with both may be a physical impossibility or the state statute may stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal open fire regulations. Under the circumstances at bar, this conflict created a situation where the permit restricted by appropriate conditions may well have been issued pursuant to the federal regulation, 36 C.F.R. §§261.1a and 261.5, while it could not have been issued under the restrictions of the State statute, SDCL 34-35-17.

However, it is the position of Appellee, and that of the South Dakota Supreme Court below, that these conflicts and the Supremacy Clause were waived by the §§561a and 561a-1 and the Cooperative Fire Control Agreement. It is somewhat ironic that had the Forest Service official been acting under the regulations controlling his office rather than acting as a State official, the permit might well have been issued and the arrests not occurred.

Yet, §§561a and 561a-1 do not support Appellee's position. Both sections merely authorize the Secretary of Agriculture "to cooperate" with the State and its subdivisions in the enforcement of the state and federal laws regarding the management of the national forest system, and to enter into agreements to that effect which set forth the details for accomplishing this organized system of management. "Cooperate" is not a synonym for waiver of federal regulatory power and jurisdiction. To construe it so would make all federal laws regarding the management of national forests entirely meaningless and surplusage. Nowhere does either law authorize a federal official to become a state official in the management of the forests (especially where there is a choice of which laws to enforce), each only authorizes the Forest Service officials to "cooperate" with State officials in the accomplishment of the State objectives. The obvious intent and purpose of the laws are to enable and encourage federal and state agencies and officials to work together for the efficient management of the forests. These laws never intended that State statutes which were more vague and inflexible than the federal regulations, and which did not accomplish the purposes of those regulations, be substituted for them. Appellants could find nothing in the legislative history of these laws which would suggest otherwise. Obviously, the Congressional intent was to

encourage federal cooperation in the enforcement of state laws to the extent that such cooperation did not conflict with federal laws and regulations.

The last sentence in §561a in this context cannot be construed to be a wholesale waiver of federal sovereignty over the national forest system. Rather, its equally obvious intent was to make clear that the states could still retain general civil and criminal jurisdiction over lands within the system and the federal law was not meant to deprive them of that "general" jurisdiction. This is not to say that where there is a specific conflict between federal regulation and state law that the federal law must give way or that the state law is not subject to the Supremacy Clause. The general rules regarding federal preemption of conflicting state law were in existence at the time these laws were passed, were well understood by both the drafters of the laws and the states, and did not need to be set forth in the statute. A wholesale waiver of federal jurisdiction over the national forest system would not have been made without abundantly clear expressions to that effect.

What was intended by "cooperation" in both statutes is perhaps best understood by the examples enumerated in both sections: reimbursement for expenditures, joint use of pollution abatement equipment, joint manpower and job training programs, joint environmental education, joint timber management and thinning, and the sharing of materials, supplies, facilities, and equipment. Nowhere is it mentioned, or even suggested, that the federal regulations would be waived or not enforced in favor of conflicting state laws on the same matters.

CONCLUSION

For the foregoing reasons, Appellee's Motion to Dismiss or Affirm should be denied in the interest of justice.

Respectfully submitted,

Andrew B. Reid

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